ABDULLAH ROHANI

v.

PUNCA KLASIK SDN BHD

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: J-02-769-1997]
16 JANUARY 2004

CIVIL PROCEDURE: *Summary judgment - Appeal against - 'Arguable' or 'bona fide triable' issues, whether any - Whether defendant showed there was 'an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial' - Whether trial judge erred in granting summary judgment for possession of land to plaintiff - Whether summary judgment should be set aside and full trial ordered - Rules of the High Court 1980, O. 14*

In 1991/1992, the plaintiff purchased a plot of land in its entirety on an 'as is' basis (without vacant possession and subject to all its encumbrances) from the trustees of the estate of one Syed Hassan Ahmad Alattas ('SHAA') for RM24 million. Upon obtaining registered ownership of the land in 1994, the plaintiff commenced an action for vacant possession against the existing occupiers of the land of whom the defendant was one. The defendant, on the other hand, claimed that his father had purchased a portion of the said land from the original trustees of the estate of SHAA in 1933. It was contended that the plaintiff's father's claim to that portion of the land was an 'admitted claim' as evidenced by a 'Further Interim Certificate' issued by the High Court in 1957. At the conclusion of the proceedings, the senior assistant registrar allowed the plaintiff's application to enter summary judgment against the defendant. The judge-in-chambers upheld the decision of the senior assistant registrar and the defendant appealed to the Court of Appeal.

Held (allowing the appeal)
Per Abdul Hamid Mohamad JCA delivering the judgment of the court

[1] In relation to an application under O. 14 Rules of the High Court 1980 ('RHC'), the defendant must, in order to be entitled to defend the action in a full trial, satisfy the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. There must be an 'arguable issue' or a '*bona fide* triable issue'. (p 779 a-f)

[2] Considering the facts and the issues of law involved herein, this was not a case in which summary judgment should be given. There were arguable or triable issues or, at the very least, 'some other reason to be a trial'. This was not a simple case of trespass or occupation without the permission of the owner. It could not be denied that the defendant's father had purchased a portion of the land from the original trustees of the estate of SHAA, paid the full purchase price thereof, proceeded to erect two houses thereon and lived thereat until his demise. The defendant's father was in occupation of that portion of the land 'uninterruptedly' and without any objection from the original or subsequent trustees of the estate of SHAA. And after his death, his beneficiaries continued to live in the two said houses. In addition, both the 'Further Interim Certificate' issued by the High Court and the 'Deed of Family Arrangement' executed by the parties also supported the defendant's case. (pp 779 g-h & 780 a-g)

[Summary judgment set aside; full trial ordered.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Dalam 1991/1992, plaintif telah membeli satu plot tanah keseluruhannya pada dasar 'seperti adanya' (tanpa milikan kosong dan tertakluk kepada kesemua bebanan) dari pemegang-pemegang amanah harta pusaka seorang Syed Hassan Ahmad Alattas ('SHAA') dengan harga RM24 juta. Setelah mendapat pemunyaan berdaftar tanah tersebut dalam tahun 1994, plaintif memulakan tindakan untuk milikan kosong terhadap penghuni-penghuni semasa tanah tersebut yang mana defendan merupakan salah seorang darinya. Defendan, sebaliknya mendakwa bahawa bapanya telah membeli satu bahagian dari tanah tersebut dari pemegang-pemegang amanah harta pusaka SHAA yang asal dalam tahun 1933. Adalah ditegaskan bahawa tuntutan bapa plaintif bahawa bahagian tanah tersebut adalah satu 'tuntutan yang diakui' sebagaimana yang diterangkan oleh "Sijil Interim Lanjut" yang dikeluarkan oleh Mahkamah Tinggi dalam tahun 1957. Pada akhir prosiding, penolong kanan pendaftar membenar permohonan plaintif untuk memasukkan penghakiman terus terhadap defendan. Hakim dalam kamar mengesahkan keputusan penolong kanan pendaftar dan defendan merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan):

Oleh Abdul Hamid Mohamad HMR menyampaikan penghakiman mahkamah

[1] Berhubung dengan permohonan di bawah A. 14 Kaedah-kaedah Mahkamah Tinggi 1980 ("KMT"), defendan mestilah, untuk berhak membela tindakan tersebut dalam perbicaraan penuh, memuaskan Mahkamah bahawa terdapat satu isu atau persoalan yang dipertikaikan yang wajar dibicarakan atau terdapat sesuatu sebab yang lain untuk dibicarakan. Hendaklah terdapat satu 'isu yang dipertikaikan' atau satu 'isu yang *bona fide* untuk dibicarakan'.

[2] Menimbangkan fakta-fakta dan isu-usu undang-undang yang terlibat di sini, ianya bukan satu kes yang mana penghakiman terus wajar diberikan. Terdapat isu-isu yang dipertikaikan atau yang boleh dibicarakan atau sekurang-kurangnya, 'alasan yang lain untuk perbicaraaan'. Ini bukanlah satu kes pencerobohan yang ringkas atau penghunian tanpa kebenaran pemilik. Ianya tidak dapat dinafikan bahawa ayah defendan telah membeli sebahagian tanah dari pemegang-pemegang amanah harta pusaka SHAA yang asal, membayar sepenuh harga beliannya, mendirikan dua buah rumah di atas tanah tersebut dan telah tinggal disitu sehinggalah kematiannya. Bapa defendan mempunyai penghunian sebahagian tanah tersebut 'tanpa gangguan' dan tanpa sebarang bantahan dari pemegang-pemegang amanah harta pusaka SHAA yang asal ataupun yang seterusnya. Dan selepas kematiannya, benefisiari-benefisiari terus tinggal di dalam kedua-dua rumah tersebut. Tambahan pula, kedua-dua 'Sijil Interim Lanjut" yang dikeluarkan oleh Mahkamah Tinggi dan "Suratikatan Perkiraan Keluarga" yang disempurnakan oleh pihak-pihak berkenaan juga menyokong kes defendan.

Penghakiman terus diketepikan; bicara penuh diarahkan.]

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Bohari Taib & Ors v. Pengarah Tanah dan Galian Selangor [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48 SC ***(foll)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***

Mok Deng Chee v. Yap See Hoi & Ors [1981] CLJ 124; [1981] CLJ (Rep) 69 FC ***(refd)***

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Ng Hee Thong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Voo Min En & Ors v. Leong Chung Fatt [1982] 2 MLJ 241 SC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 89

For the appellant - RR Mahendran; M/s RR Mahendran & Co
For the respondent - Ng Chew Hor; M/s Ng Fan & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad JCA:

By a sale and purchase agreement dated 9 July 1991 between the respondent (plaintiff in the High Court) and the trustees of the estate of Syed Hassan bin Ahmad Alattas, the respondent purchased the whole of lot 1471 held under grant No. 26977 for the sum of RM24,000,000. The purchase was on an "AS IS" basis, without vacant possession and subject to all existing occupiers: squatters, tenants and/or claimants. The sale and purchase agreement was subsequently approved by Johor Bahru High Court by an order dated 29 February 1992 with a term under cl. 1(d)(vii) as follows:

> tanah tersebut mesti dijual secara "as is" tanpa milikan kosong (vacant possession) termasuk segala apa jenis encumbrances terhadapnya termasuk kaveat, setinggan, penyewa serta apa-apa tuntutan terhadapnya.

The respondent obtained the registered-ownership of the said land on 21 January 1994. It appears that soon after that the respondent commenced proceedings for vacant possession against the existing occupiers, the suit that gives rise to this appeal was filed on 1 August 1996. In this suit the respondent claims possession of about 10,000 sq. ft. of land occupied by the appellant.

In his defence the appellant claimed that his father, Rohani bin Mizan, had entered into a sale and purchase agreement dated 24 March 1933 with the original trustees of the estate of Syed Hassan Al- Attas, whereby the appellant's father bought a portion of the said land measuring about 10,000 square feet which was demarcated and identified as lots 19 & 20 in section "L" for a price of RM500. The full purchase price had been paid by the appellant's father. It was a term of the agreement that the said original trustees shall deposit the Malay Grant No. 1572 in the land office for subdivision as soon as 1/3 of the said land is sold. Clause 4 of the 1933 agreement states that once individual grants for lots 19 and 20 have been issued and full purchase price paid the trustees shall execute memorandum of transfer in favour of the appellant's father.

Pursuant to a civil suit in the Johor Bahru High Court in Civil Suit No.20 of 1937 filed by Estate of Trust Agencies (1927) Ltd. as the subsequent trustees of the estate against the beneficiaries of the said estate, the appellant's father's claim to the said portion was recognised by the parties to the suit and noted as an "admitted claim". The Assistant Registrar's Further Interim Certificate issued on 24 November 1957 contained the terms of the acknowledgment or admission as follows:

(a) the agreement in writing dated March 24, 1933 shall be accepted as proof under clause 8(b)(iv) of the Deed of Family Arrangement;

(b) no action was to be taken against those persons who had purchased parts of the deceased's property from the four trustees and executors of the deceased's estate under clause 9(d) of the Deed of family Arrangement; and

(c) all the properties sold by the four trustees and executors of the deceased's estate were to be transferred to the respective purchasers or their successors-in-title under the second schedule of paragraph 3 (L) of the Deed of family Arrangement.

On 10 September 1959 the said Deed of Family Arrangement was approved by the court.

The respondent filed an application for summary judgment under O. 14 of the Rules of the High Court 1980 (RHC 1980). The senior assistant registrar allowed the application. On appeal to the judge-in-chambers, the learned judge agreed with the senior assistant registrar. The appellant appealed to this court. We allowed the appeal the effect of which is that the suit will go for full trial.

In a lengthy judgment that makes it quite difficult for us to look for his reasons, the learned judge held that the respondent had succeeded in establishing their title to the whole of lot 4271 and that the burden was on the appellant "to confess and avoid by setting up a title or a right to possession consistent with the facts of ownership vested in the respondent." The learned judge held that the Assistant Registrar's Further Interim Certificate relating to the acknowledgment reproduced earlier "was nothing more than an admission that there was a contractual relationship between the four trustees and executors of the deceased's estate" with the appellant's father. It does not mean that the appellant's father became the beneficial owner of the 10,000 square feet of land. "In short", the learned judge said, "the Assistant Registrar's Further Interim Certificate did not transfer nor pass title to 10,000 square feet to the defendant"

(appellant). The learned judge also dismissed the argument that the appellant had a tenancy coupled with equity as "totally unsubstantiated" as there was no tenancy between the appellant's father and the respondent even though the appellant or his father had expended money to put up the premises on the land as the appellant's father ought to have known that he had no legal title to it.

On the counterclaim, the learned judge held that to construe and declare the defendant as a beneficial owner of the 10,000 square feet of land "out of the big chunk of land held by Punca Klasik (the respondent) would be an exercise in futility". For that the learned judge relied on *Borneo Housing Mortgage Finance Bhd v. Time Engineering Berhad (formerly known as Time Engineering Sdn. Bhd)* [1996] 2 CLJ 561 in which it was held that before a vendor would become a bare trustee and the purchaser a beneficial owner two conditions must be satisfied, namely:

(i) the full purchase price has been paid timeously; and

(ii) the purchaser must have procured a memorandum of transfer in the prescribed form which is registrable from the vendor.

The learned judge, while finding that the first condition was satisfied, found that the second condition was not. Therefore the appellant's father was not a beneficial owner. The learned judge also referred to five other similar cases involving the same piece of land in which judgments were given in favour of the respondent at High Court level, four of which were his own judgments. He found that the present case was no different from those other cases.

The learned judge also found that the appellant's father was a trespasser since 14 January 1935 when he purchased the 10,000 sq. feet of land "simply because there was no valid memorandum of transfer capable of registration." The learned judge said:

> It was apparent that the entry was lawful and it became unlawful as the years go by. The late Haji Rohani bin Mizan (the Appellant's father – added) and his beneficiaries that stayed on that portion of land were under delusions that mere possession and occupation would give them beneficial ownership of that occupation. They were wrong. It was an expensive mistake.

The learned judge dismissed the counterclaim for a declaration that the respondent holds the property as a bare trustee for and on behalf of the appellant who is the absolute beneficial owner of the property.

We remind ourselves that this appeal arises from a summary judgment under O. 14 of the RHC 1980. It is trite law that in such an application the onus on the defendant (appellant) to be entitled to defend the action in a full trial, is to satisfy the court that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial ..." O. 14 r. 3(1). Courts have described it as "arguable issue" or "triable issue". Thus in *Voo Min En & Ors. v. Leong Chung Fatt* [1982] 2 MLJ 241 (SC) it was said that "... The issue raised must be an arguable issue." In *Ng Hee Thong & Anor v. Public Bank Bhd.* [1995] 1 CLJ 609, the Court of Appeal asked the question "Is there a *bona fide* triable issue?"

In *Bohari bin Taib & Ors v. Pengarah Tanah dan Galian Selangor* [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48 the Supreme Court said:

> On the other hand, like the default and summary procedures under O. 13 and O. 14, this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try i.e. where there is no reasonable doubt as to the claim of the Plaintiff to recover possession of the land or as to wrongful occupation of the land without licence or consent and without any right, title or interest thereto.

The last mentioned case, it should be noted is a case where the appellants were occupying State land and subsequently applied to the State Authority for titles to the said land. Even though it was alleged that the Selangor State Executive Council had approved the alienation of the land to the appellants who were also assured by a member of the State Executive Council that the appellants would be given titles to the said land, no title had been issued. Temporary Occupation Licences that were issued for three consecutive years had expired. Even under the circumstances, the Supreme Court was of the view that that was not the type of case where summary judgment under O. 89 RHC 1980 should be given. The Supreme Court specifically stated the similarity between O. 89 and O. 14 of the RHC 1980.

We are also mindful of the cases referred to us by learned counsel for the respondent in particular *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 (SC), and *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 (FC).

We also remind ourselves that, since we have set aside the summary judgment and the suit will go for trial, we should not say too much so as not to bind or influence the learned judge who will be hearing the case and giving his decision. We leave all issues open for him to try and to decide.

All that we would say at this stage is that, considering the facts of the case and issues of law involved, we are of the view that this case is not a case in which a summary judgment should be given. We are of the view that there are arguable or triable issues and, at the very least, it falls within the phrase "or that there ought for some other reason to be a trial ..."

And we say so for the following reasons. First, this is not a simple case of trespass or occupation without the permission of the owner. Whatever its legal effect that would be decided by the trial judge after the trial, it is undeniable that the appellants father "had bought" that portion of the land from the original trustees, paid the full purchase price, proceeded to erect two houses on the land, lived there until he died. True that that no title was obtained by him in his lifetime, but he was in occupation of the land uninterruptedly and without any objection leave that to the trial judge to try that the real issue is whether the from the original or subsequent trustees. After his death, his beneficiaries continued to live in the two houses. There is the Senior Assistant Registrar's Further Interim Certificate dated 24 November 1957 in which the appellant's father's claim was acknowledged as "claims admitted". There is the Deed of Family Arrangement that was executed by the parties to Civil Suit no. 20 of 1937 where the portion sold to the appellant's father should be transferred to him. That Deed of Family Arrangement was approved by a court order in the same civil suit. Would that not be binding on the parties to the suit including the trustees of the estate who subsequently sold the land to the respondent? Would the respondent, having purchased the whole land from the trustees on an "AS IS" basis be entitled to summarily evict the appellants without any compensation whatsoever? *Mok Deng Chee v. Yap See Hoi & Ors* [1981] CLJ 124; [1981] CLJ (Rep) 69 (FC) offers an illustration in which the equity of a RM1 a month ground tenant was not lost even though the land was sold to a new owner. We are not deciding at this stage that in the instant case whether the appellant has an equity or whether it has been lost or not. We leave that to the trial judge to try the issue and decide. We would like to emphasise that the real issue is whether the respondent is entitled to a summary judgment to evict the appellant without even a full trial. We are of the view that the appellant should be given the liberty to defend the suit. We set aside the summary judgment and direct that the suit proceed to a full trial. This appeal is allowed with costs here and in the court below and that the deposit be refunded to the appellant.